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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 362

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES (a national banking association),

Petitioner,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic; and CITY OF VERNON, a municipal corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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SUBJECT INDEX

PAGE

Opinions below 2

Jurisdiction 2

Constitutional provisions and statutes..... 3

Questions presented 4

Summary statement 5

Reasons relied on for allowance of the writ..... 12

1. Denial of petitioner's rights to recovery for failure to appear before the Board of Equalization determines a federal question contrary to decisions of this court..... 12

2. Decisions of this court hold that a state which has denied a taxpayer equal treatment cannot impose upon him the burden of removing the inequality by seeking upward revision of taxes of others..... 13

3. Decisions of this court hold that a taxpayer will not be barred from tax recovery because of failure to apply to a board of equalization when such would have been a futile act 14

4. For the California Supreme Court to require, for the first time in 39 years, a taxpayer to appear before a county board of equalization under the circumstances of this case and to apply such rule retroactively when petitioner could not comply, constituted a denial of due process of law..... 15

Conclusion 17

INDEX TO APPENDICES

PAGE

Appendix A 1

1. Pertinent provisions of the California Constitution and statutes relating to the assessment of local ad valorem taxes 1

2. Pertinent provisions of the California Constitution and statutes relating to powers and duties of a county board of equalization 2

3. Pertinent provisions of California statutes relating to payment of local taxes under protest and terms of judgment in tax recovery actions 3

4. Pertinent provisions of California statutes relating to reassessment proceedings 5

5. Pertinent provisions of the California Constitution and statutes relating to exemption from local taxation of personal property of banks and taxation of bank income at a higher rate because of such exemption 7

Appendix B. Reasons relied on for allowance of the writ as to Grounds 3-6, inclusive 10

5. So long as a state generally classifies and taxes fixtures as personal property, it has no power to classify and tax national bank fixtures as "real property"; taxes so levied in order to evade restrictions of R. S. 5219 constitute "discrimination" 10

6. So long as a state classifies and taxes fixtures, if at all, as personal property, the equal protection clause and R. S. 5219 require like treatment of national bank fixtures 13

7. "Discrimination" in violation of R. S. 5219 and the equal protection clause is not excused by levy of personal property taxes on other misclassified fixtures 14

PAGE

8. Assuming arguendo validity of tax equivalence contention, the State Supreme Court disregarded decisions of this court as to what constitutes equivalency..... 16

9. In withholding from petitioners full recovery of their invalid taxes contrary to decisions of this court and as required by valid state statute, the judgment of the California Supreme Court was a denial of due process of law 18

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Associated Oil Co. v. County of Orange, 4 Cal. App. 2d 5, 40 P. 2d 887	15
Brenner v. City of Los Angeles, 160 Cal. 72, 116 Pac. 397	11, 15, 16
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673	16, 17
California etc. Co. v. Los Angeles, 10 Cal. App. 185, 101 Pac. 547	16
City and County of San Francisco v. County of San Mateo, 95 A. C. A. 699, 213 P. 2d 505	15
Fisher v. Whiton, 317 U. S. 217	13
Henne v. County of Los Angeles, 129 Cal. 297, 61 Pac. 1081	15
Hills v. Exchange Bank, 105 U. S. 319	15
Hillsborough Township v. Cromwell, 326 U. S. 620	14
Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239	14
Kaiser Co. v. Reed, 30 Cal. 2d 610, 184 P. 2d 879	17
Kern River Co. v. County of Los Angeles, 164 Cal. 751, 130 Pac. 714	15
Los Angeles etc. Corp. v. Los Angeles, 22 Cal. App. 2d 418, 71 P. 2d 282	15
Luce v. City of San Diego, 198 Cal. 405, 245 Pac. 196	15
Missouri ex rel. Missouri v. Gehner, 281 U. S. 313	17
Montana National Bank v. Yellowstone County, 276 U. S. 499	15
Rawlings v. Ray, 312 U. S. 96	13
Sioux City Bridge Co. v. Dakota County, 260 U. S. 441	14
Standard Oil Company of California v. Johnson, 316 U. S. 481	13
Whitbeck v. Mercantile Bank, 127 U. S. 193	15

STATUTES

California Bank and Corporation Franchise Tax Act, Sec. 4a	3, 9
California Constitution, Art. XIII, Secs. 2, 9, 10, 16	3
California Constitution, Art. XIII, Sec. 9	3, 10

PAGE

California Constitution, Art. XIII, Sec. 16, 1, (a) 5
California Revenue and Taxation Code, Sec. 601 3
California Revenue and Taxation Code, Sec. 602 3
California Revenue and Taxation Code, Sec. 607 3
California Revenue and Taxation Code, Sec. 1601 3
California Revenue and Taxation Code, Secs. 1603-1611 3
California Revenue and Taxation Code, Sec. 1611 ..... 10, 11, 14
California Revenue and Taxation Code, Sec. 4946-4948 ..... 3, 5, 9, 10
California Revenue and Taxation Code, Secs. 5136-5143 3
California Revenue and Taxation Code, Sec. 5141 10
Revised Statutes, Sec. 5219, par. 3 3
United States Code, Title 12, Sec. 548, par. 3 (R. S. 5219) 1, 2, 4, 5, 8, 9, 12, 13, 14
United States Code, Title 28, Sec. 1257(3) 2
United States Code, Title 28, Sec. 2101(c) 2
United States Constitution, Fourteenth Amendment, Sec. 1 ..... 1, 2, 3

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No.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES (a national banking association),

Petitioner,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic; and CITY OF VERNON, a municipal corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner national bank prays that Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California entered May 2, 1950 [R. 141] reversing judgment in its favor by the Superior Court of the State of California in and for the County of Los Angeles. Judgment in the trial court had ordered refund of local taxes on petitioner's "real property" because of "discrimination" in violation of paragraph 3 of 12 U. S. C. 548 (R. S. 5219) and the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States.

Except for one procedural aspect, the judgment of the State Supreme Court herein is supplemental to and based upon the decision of said court rendered on the same day in *W. J. Simms, et al. v. County of Los Angeles, et al.* [R. 127-141] which is also sought to be reviewed in *certiorari* by this Court in case number 361, October Term, 1950.

Petitions for rehearing herein and in the *Simms Case*

were filed on May 17, 1950 [R. 143; 178], and denied in both on June 1, 1950 [R. 177; 285]. Extension of time for filing this petition until October 16, 1950 was granted by this Court [R. 294].

Opinions Below.

The opinion of the Superior Court [R. 68-75] is not reported. The opinion of the Supreme Court of the State of California [R. 124-126] herein is reported in 35 Advance California Reports 348 (217 P. 2d 946). The opinion of the State Supreme Court in the companion *Simms Case* is reported in 35 Advance California Reports 332 (217 P. 2d 936) and is included in the record herein [R. 127-141]. The State Supreme Court rendered no opinion in entering its order denying rehearing herein [R. 177] and none in the companion *Simms Case* [R. 285].

Jurisdiction.

Jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) and 2101(c). Drawn into question is construction by the California Supreme Court of rights, privileges, and immunities under:

(a) Paragraph 3 of 12 U. S. C. 548 (R. S. 5219);

(b) The Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States;

(c) The Due Process clause of the Fourteenth Amendment of the Constitution of the United States.

As to (a) and (b), such questions were properly raised by initial pleadings in the trial court [R. 4-6] and were expressly found by it to have been violated in the levy of the taxes on petitioner's "real property" [R. 58-61]. But the California Supreme Court in its judgment held such to be ***not*** violated, except as to certain "special assessment" taxes [R. 132-133; 134-136; 137]. The last, (c), arose

for the first time by reason of the disregard by the court below in its judgment of vested rights of petitioners under the Federal statute and Constitution; it was timely raised on petition for rehearing filed in the California Supreme Court [R. 150; 160-167].

Constitutional Provisions and Statutes.

Pertinent provisions of the Fourteenth Amendment are contained in section 1 thereof reading as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent provision of R. S. 5219 involved is paragraph 3 conditionally authorizing State *ad valorem* taxation of "real property" of national banks upon the following terms:

> "Nothing herein shall be construed to exempt the real property of associations from taxation in any state or any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

Sections 2, 9, 10, and 16 of Article XIII of the California Constitution are involved herein. California Statutes involved are: (1) Provisions of the California Revenue and Taxation Code relating to the "assessment roll" (Sections 601, 602, and 607); (2) Provisions of said Code relating to "equalization by County Board of Equalization" (Sections 1601, 1603-1611); (3) Provisions of said Code relating to "payment under protest and suit to recover" (Sections 5136-5143); (4) Provisions of said Code relating to "enforcement of tax after erroneous proceedings" (Sections 4946-4948); and (5) Section 4a of the California Bank and Corporation Franchise Tax Act relating to taxation of income of national banking associations. Pertinent provisions of these sections are set forth in Appendix A (pp. 1-9).

Questions Presented.

Questions presented by this petition are:

1. When a state court of last resort by companion decision entered on the same day finds that earlier application made to a board of equalization by other taxpayers in the same year upon identical grounds had been fruitless, is it not contrary to decisions of this Court for such state court to hold that a taxpayer, whose claim is based upon the discrimination prohibited by R. S. 5219 and the Equal Protection clause, is barred from recovery of a judicially found invalid tax solely because it failed to make a further and futile application to the same board for relief?

2. When administrative relief is no longer available because of passage of time, is not a judgment of a state court of last resort in 1950 a denial of Due Process of Law when it holds for the first time and contrary to its rule of decision since 1911 that a taxpayer otherwise entitled to recovery of taxes, invalid as in violation of R. S. 5219 and the Equal Protection clause, is barred from such recovery for failure to have made initial application for relief to a county board of equalization in 1941?

3. Whether local taxation of national bank fixtures as real property is authorized by paragraph 3 of R. S. 5219 when all other fixtures of the same class are taxed to others, if at all, as personal property?

4. Whether an arbitrary administrative classification, in effecting a tax discrimination between taxpayers of the same class and similarly situated, is a violation of the Equal Protection clause?

5. Whether it is proper in determining the extent of local taxes levied on national bank fixtures, arbitrarily classified as real property, to consider the effect of a state tax, imposed solely on national and state banks to compensate for the tax exemption required by Paragraph 3, R.S. 5219, when such state tax is computed at a rate dependent upon personal property taxes, paid by non-banking

corporations, and such rate was necessarily increased because all fixtures of non-banking corporations were classified as personal property?

6. Whether action by a state court of last resort refusing a taxpayer relief by way of tax recovery judgment granted him by an unassailed and unambiguous State statute, because of a "policy" declared by such state court for the first time in its decision, is a denial of Due Process of Law when, under the facts found, the taxpayer was entitled to recovery of its taxes as invalid under both Paragraph 3 of R.S. 5219 and the Equal Protection clause.

Summary Statement.

Facts: This is an action brought by petitioner national bank to recover 1941 taxes paid under protest which had been levied upon a building owned and occupied by it for banking purposes. Petitioner's ground for recovery was that there had been included in its building assessment, contrary to the practice as to all other buildings, fixtures owned by petitioner which under the assessor's general practice of classifying other fixtures as personal property, if granted similar treatment, were exempt from State *ad valorem* taxation under R. S. 5219, the Equal Protection clause, and provisions of the State Constitution (Cal. Const. Art. XIII, section 16, 1; (a); App. A, p. 7).

Judgment was rendered herein by the trial court for petitioner for recovery in full of its building taxes [R. 64-67] subject to reassessment by respondents as to the building proper in accordance with State statute (R. & T. C. 4946-4948; App. A, pp. 5-7).

Such judgment was rendered concurrently by the trial court with 23 other judgments, based upon substantially identical findings and conclusions on similar facts covering the period 1941-1946, in suits brought by petitioner national bank or landlords of buildings occupied by national banks as tenants.

In its decision in the *Simms Case* [R. 127-141], the California Supreme Court reversed these other judgments by single judgment, review of which is sought from this Court in Case No. 261. A separate decision and judgment was rendered in this case which, however, relied wholly upon the opinion in the *Simms Case* for statement of facts and substantive law involved [R. 124-126].

Basic facts herein, as stated by the State Supreme Court in the companion *Simms Case,* with appropriate reference to the identical findings and conclusions of law entered by the trial court herein, are set forth below to the extent material:

> "For several years prior to 1940 the Los Angeles County Assessor, . . . followed the general practice of classifying bank vault doors and counterlines[1] as personal property. No ad valorem taxes were paid thereon since the personal property of national banks is exempt from local taxation. Following the decision . . . in San Diego Trust & Savings Bank v. County of San Diego, 16 Cal. 2d 142, in 1940, however, the assessor reclassified and assessed vault doors and counterlines installed in buildings used for banking purposes as part of the building improvements or real estate . . ." [R. 128; based on findings of trial court, R. 30-31; 44].
>
> "In each of the tax years involved in the present appeals, bank vault doors and counterlines installed in plaintiffs' buildings were classified as real property and, without being separately valued, were included with the buildings in assessments of improvements. During that period, however, as to property other than that occupied by banks it was the assessor's general practice to classify and assess as *personal* property certain articles, machinery and equipment installed in buildings for purposes of trade, commercial or industrial uses. Typical of this practice was the

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[1]By footnote elsewhere the court indicated that "The word 'counterlines' is used to denote combinations of counters, wickets, grilles, partitions, etc."

treatment accorded to more than sixty items of property, including, among others, vault doors and counterlines of jewelers and furriers, refrigerators and counters in public markets, restaurant counters and booths, office partitions, printing presses of metropolitan newspapers, and a variety of heavy industrial machinery such as boilers, ovens and generators" [R. 129; based on findings of trial court, R. 31-39].

"The trial court found and concluded that in classifying and assessing banking fixtures as improvements, the assessor had intentionally, deliberately and without justification deviated from his general practice with regard to the classification and assessment of fixtures, and that such differences in treatment of similar property constituted discrimination against plaintiffs prohibited by various provisions of the federal and state constitutions and by section 5219 of the Revised Statutes of the United States (12 U. S. C. A. §548). [R. 129-130; based on findings and conclusions of trial court, R. 48, 58-59.] It also determined that since bank vault doors and counterlines were included with each building in a single assessment of improvements, the invalid and otherwise valid portions of each assessment were indivisible and consequently all taxes levied thereon were void. Judgments were accordingly entered for plaintiffs, and these appeals followed" [R. 130; based on findings and conclusions of trial court, R. 48-49, 59-60, 60-61.]

The State Supreme Court said in the present case:

"This case differs from Simms v. County of Los Angeles, ante p. ....., in that in the present case plaintiff did not apply to the board of equalization for correction of the assertedly erroneous assessment. The trial court held that plaintiff was not precluded from maintaining this action for recovery of taxes paid under protest" [R. 124; based on findings and conclusions of trial court, R. 60].

Proceedings Before California Supreme Court: In its two decisions the State Supreme Court adopted factual findings made by the trial court [R. 128-129]. It held petitioners had complied procedurally with the state protest

statute [R. 130]. It concluded that national bank fixtures had been correctly classified under state statute as "real property" but all comparable articles had been "misclassified" by the assessor's general practice as personal property [R. 130]. Under California law, it held that assessments for tax purposes varying from those made on property of like character would be "invalidated" when, as here, the assessor's "deviation" from general practice was "intentional," "deliberate" and "not justified" [R. 130-131].

In reversing judgments entered in the trial court for petitioners in the *Simms Case* the State Supreme Court approved certain legal conclusions reached by the trial court herein and disapproved others. It recognized that had bank fixtures received "the same classification accorded fixtures generally, they would have been exempt from taxation" [R. 132-3]. But relying upon the state definition of fixtures for tax purposes as real property, it held that to grant bank fixtures a similar "misclassification" would accord them an "unwarranted exemption" [R. 133]. Contrary to the trial court herein[2] the State Supreme Court in the *Simms Case* declared that neither R. S. 5219 [R. 136] nor the Equal Protection clause [R. 134-5] protected bank fixtures from "intentional," "deliberate" and "unjustified" tax *classification* different from that accorded other comparable fixtures.

Contrary to the trial court herein[3] the State Supreme Court in the *Simms Case* held petitioners' assessments therein to be "valid" unless a tax "burden" (by reason of

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[2]The trial court concluded that the difference in classification "treatment" given by the assessor constituted "discrimination" prohibited by R. S. 5219 [R. 58-59] and the Equal Protection clause [R. 58-59].

[3]In view of the assessor's general practice, the trial court held that assessments of national bank fixtures as real property were in violation of R. S. 5219 [R. 59-60] and the Equal Protection clause [R. 59-60], and, therefore, "void."

resultant taxes) was imposed in excess of that put on fixtures "misclassified" as personalty [R. 135]. Since fixtures assessed as personal property had been subjected to general city and county taxes at the same rates and in the same proportion of value, it concluded that petitioners' assessments for general taxes were valid [R. 136] but for special assessment taxes (not levied on personal property) were "invalid" [R. 137].

The trial court herein held that all taxes on petitioner's buildings were "void" [R. 61] and entered judgments accordingly [R. 64-67]. Under the judgments of the trial court, the taxing entities would not thereby lose any *valid* taxes on petitioners' buildings because such buildings were subject to reassessment under state statute (R. & T. C. 4946-4948; App. A, pp. 5-7) by which taxes on petitioners' buildings for the period of found invalidity could be collected along with and in addition to current taxes. The State Supreme Court in the *Simms Case* held the special assessment taxes only to be "invalid" [R. 137] and restricted petitioners' judgments therein to such [R. 141]. It ignored the reassessment statute.

The State Supreme Court rested its results in the *Simms Case* to the extent they conflicted with the reasoning of the trial court almost wholly upon its conclusion that tax "discrimination" prohibited by R. S. 5219 and the Equal Protection clause can be found only in discriminatory "tax burdens" [R. 135]. In the same *Simms* decision it found: that Section 4a of the California Bank and Corporation Franchise Tax Act imposed a special and additional "in lieu" tax upon national banks not levied upon non-banking corporations [R. 136]; that the rate of this tax was computed by reference to the amount of personal property taxes, including taxes on fixtures assessed as personalty, paid locally by non-banking corporations [R. 136]; but that such tax was levied by and on behalf of the State,

not its local entities [R. 134]. It concluded that this State tax should not be considered as part of the true tax burden on national bank fixtures because "discrimination," it asserted, cannot be shown by "proof of injury resulting from the act of a different and independent taxing authority" [R. 134].

The State Supreme Court in the *Simms Case* adopted the trial court's conclusion that petitioners' assessments were indivisible and could not be judicially separated between fixtures and buildings [R. 137]. Contrary to the judgments as entered by the trial court which included recovery of all taxes in controversy [R. 68-75], subject to right of reassessment, the State Supreme Court in the *Simms Case* ordered the trial court to secure a determination of the value of the buildings, with bank fixtures excluded, from the county board of equalization and, based thereon, to enter judgment for petitioners only for special assessment taxes upon the value of the bank fixtures [R. 140]. In so doing, the California Supreme Court ignored requirements of the state tax recovery statute [R. & T. C. 5141 (App. A, p. 5)], the limited powers of a county board of equalization [Cal. Const. Art. XIII, sec. 9 (App. A, p. 2); R. & T. C. 1611 (App. A, p. 3)] and the state reassessment statute [R. & T. C. 4946-4948 (App. A, pp, 5-7)]. It simply held it was contrary to "policy" to deprive public bodies of revenue in order to refund taxes void in substantial part and which the court could not separate between valid and void parts [R. 137].

In this case, the State Supreme Court refused even to grant such *limited* relief to petitioner because petitioner had not applied formally to the county board of equalization so that it "could have eliminated the discrimination by directing the assessor to enter the misclassified fixtures owned by others as real property upon the assessment roll" [R. 126]. The Supreme Court thus held that the prelimi-

nary administrative relief for want of which it barred petitioner's recovery herein of a found invalid tax was not action to reduce or correct its own illegal assessment, but failure to take administrative steps which, if complied with, would have *increased* assessments of all other taxpayers similarly situated made contrary to State statute.

The California Supreme Court recognized that there was no obligation upon a taxpayer in any case to appear before a county board of equalization if the property assessed in whole or in part was "tax exempt" or "outside the jurisdiction" of California to tax [R. 124]. As in the *Simms Case,* the State Supreme Court predicated its found want of compliance with administrative relief upon the assumption that national bank fixtures because of definition by state statute as "real property" must be regarded as taxable property procedurally as well as substantively.

The State Supreme Court disregarded its finding in the *Simms Case* that application had been made in the same year and before the same board by landlords of national banks and the board with full knowledge of "the facts" showing "discrimination" against national bank fixtures had refused relief [R. 132]. These applications were for relief under Section 1611 [R. 109]. Although primarily directed at assessments of buildings owned by landlords of national banks, petitioner and other national banks directly participated therein [R. 121].

The trial court herein held that petitioner was not precluded from recovery by failure to appear before the county board of equalization since "the sole question involved in its assessment was legality of the classification and assessment of plaintiff's property" [R. 60]. The trial court relied upon the decision of the California Supreme Court in *Brenner v. City of Los Angeles,* 160 Cal. 72, 76, 116 Pac. 397 (1911). Until the decision in this case the *Brenner Case* had been uniformly followed in California. The contrary holding in 1950 in the judgment below was applied ***retroactively*** to petitioner's case made in 1941 in

reliance upon the *then* unquestioned rule. The State Supreme Court in summarily reversing judgment for petitioner found it, because of passage of time, *now* could not employ the new-found administrative remedy [R. 126].

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Petitioner's reasons for issuance of the Writ herein as to questions 3 to 6, inclusive, are identical with those presented to this Court on petition for *certiorari* in the *Simms Case* No. 361. To avoid repetition, such reasons are set forth with appropriate references to this record in Appendix B (pp. 10-21) to this petition. They will not be referred to below except as necessary to discuss questions 1 and 2.

1. **Denial of Petitioner's Right to Recovery for Failure to Appear Before the Board of Equalization Determines a Federal Question Contrary to Decisions of This Court.**

In this case the court below denied petitioner any recovery solely because it had failed preliminarily to appear before the county board of equalization. In applying this procedural bar, the court recognized that there was an exception "when the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction" [R. 124]. It recognized that petitioner contended that national bank fixtures were "exempt" under the statutory mandate of R. S. 5219 and the Federal Constitutional guaranty of equal protection [R. 125]. The court, however, refused to sustain petitioner, saying that national bank fixtures were "property of a nature taxable by defendant" and "admittedly were located within the County, City and District in which they were assessed" [R. 125]. The gist of the judgment below, although procedural in nature, thus involved a determination under the circumstances of this case as to whether petitioner's fixtures were in truth "exempt" or "outside the jurisdiction" of the State of California to tax. If so, on the face of the opinion below, the procedural bar was erroneously applied.

Such determination involved construction by the State Court of the equal treatment requirements of R. S. 5219 and the Equal Protection clause. The decision of the State Court below is not binding on such matters upon this Court. The basic Federal question upon which the application of the procedural bar confessedly rested is one ultimately for determination by this Court. *Standard Oil Company of California v. Johnson,* 316 U. S. 481, 483; *Fisher v. Whiton,* 317 U. S. 217, 220; *Rawlings v. Ray,* 312 U. S. 96, 98.

Such determination by the State Court herein was contrary to decisions of this Court in reference to both R. S. 5219 and the Equal Protection clause. The authorities which sustain petitioner's contentions are briefly stated in Reasons for Allowing the Writ, Nos. 5-9 (App. B pp. 10-21). Under these authorities and the facts of this case, it is clear that petitioner's national bank fixtures were not only "exempt" from taxation in Los Angeles County but its building was beyond the "jurisdiction" of respondents to tax, until by appropriate reassessment proceedings petitioner's building had been assessed in the same manner as other buildings had been assessed in Los Angeles County.

2. Decisions of This Court Hold That a State Which Has Denied a Taxpayer Equal Treatment Cannot Impose Upon Him the Burden of Removing the Inequality by Seeking Upward Revision of Taxes of Others.

Appearance before the board of equalization in 1941, for want of which the California Supreme Court barred petitioner's recovery, was not the usual taxpayer's application to secure reduction of or to cure a defect in *his own* assessment. Relief which the State Supreme Court said petitioner should have sought was for the board to direct the assessor "to enter the *misclassified* fixtures owned by *others* as real property upon the assessment roll" [R. 126] and thereby remove the "discrimination."

This Court has long held that a State cannot deny a taxpayer equal treatment in violation of either R. S. 5219 or the Equal Protection clause and excuse the resultant injury by placing upon him the burden of securing an upward revision in the taxes of other members of the same class. *Hillsborough Township v. Cromwell,* 326 U. S. 620, 623; *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 247; *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 445-447. Moreover, there is no statutory procedure in California by which a taxpayer can initiate such proceeding or compel action if the board fails to act (R. & T. C. 1611, App. A p. 3).

3. Decisions of This Court Hold That a Taxpayer Will Not Be Barred From Tax Recovery Because of Failure to Apply to a Board of Equalization When Such Would Have Been a Futile Act.

The State Supreme Court in the *Simms Case* found that "the facts" as to the assessor's general practice of classifying trade fixtures as personalty and his intentional, deliberate and unjustified deviation therefrom as to national bank fixtures "had been presented to the county board of equalization which, with full knowledge thereof, denied applications for relief" in each of the years in controversy [R. 132]. In 1941 relief was specifically asked under Revenue and Taxation Code Section 1611 by landlords of petitioner bank [R. 109]. At such time, petitioner national bank joined in their application although it was primarily directed at fixtures located in landlord-owned buildings [R. 109, 121]. For petitioner bank to have made an additional formal appearance as to its own building would have been to do an idle and useless act.

When a state court finds a tax to have been levied in violation of R. S. 5219 or contrary to requirements of the Equal Protection clause, this Court will not permit it to refuse to return the invalid taxes because the taxpayer

failed to apply to a board of equalization if it appears that to have done so would have been futile or useless. *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 505; *Hills v. Exchange Bank,* 105 U. S. 319, 321; *Whitbeck v. Mercantile Bank,* 127 U. S. 193, 199.

4. For the California Supreme Court to Require, for the First Time in 39 Years, a Taxpayer to Appear Before a County Board of Equalization Under the Circumstances of This Case and to Apply Such Rule Retroactively When Petitioner Could Not Comply, Constituted a Denial of Due Process of Law.

Prior to 1911 the California rule was that application to a county board of equalization was a required preliminary step before attacking in court the validity of an assessment even though it were claimed to be void because of inclusion of exempt property. *Henne v. County of Los Angeles,* 129 Cal. 297, 61 Pac. 1081. In 1911 the State Supreme Court in *Brenner v. City of Los Angeles,* 160 Cal. 72, 76, 116 Pac. 397, 399, repudiated the *Henne Case* saying:

> "But we are of the opinion that, insofar as *Henne v. County of Los Angeles* places in the same category the mere over-valuation of property in an assessment thereof, and the inclusion in such an assessment of property not taxable at all, that case should be overruled."

When these proceedings took place (1941) and substantially at all times up to decision herein, the *Brenner Case* stood unquestioned.[4] Throughout the controversy in this

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[4] *Kern River Co. v. County of Los Angeles,* 164 Cal. 751, 756, 130 Pac. 714, 715 (1913); *Luce v. City of San Diego,* 198 Cal. 405, 406, 245 Pac. 196 (1926); *Associated Oil Co. v. County of Orange,* 4 C. A. 2d 5, 9, 40 Pac. 2d 887, 889 (1935); *Los Angeles etc. Corp. v. Los Angeles,* 22 C. A. 2d 418, 422, 71 Pac. 2d 282, 284 (1937); *City and County of San Francisco v. County of San Mateo,* 95 A. C. A. 699, 703, 213 Pac. 2d 505, 508 (1950).

It was not until hearing was granted by the State Supreme Court in the last cited decision on March 16, 1950, that there was any indication in California that an application before a board of equalization was required in any but an overvaluation case.

and in the *Simms Case,* counsel for respondents and the county board of equalization itself took the position that questions involved were matters which could *not* be presented to or considered by a county board of equalization [R. 90-91; 152-155].

Contrary to its established rule of 39 years duration, the State Supreme Court has thus held herein that a taxpayer is barred from recovery of a tax known to be invalid under Federal Statute and Constitution because of a heretofore undiscovered administrative requirement. It has applied such new rule retroactively to a proceeding instituted nine years earlier. By summarily directing the trial court to enter judgment for the defendant, it has held that, because of passage of time, petitioner cannot now make the newly required administrative application.

On identical facts this Court by Mr. Justice Brandeis in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 679-80, has said:

> ". . . If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious . . . The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."

Cases cited by the State Supreme Court in support of its holding that application to a board of equalization is required when discrimination has occurred in "classification of property," have no bearing upon the denial of due process herein. *California etc. Co. v. Los Angeles,* 10 Cal. App. 185, 101 Pac. 547 (1909), was an inferior court decision. If it was opposed to the *Brenner Case,* it was over-

ruled by it in 1911. *Kaiser Co. v. Reed,* 30 Cal. 2d 610, 630, 184 P. 2d 879, 891, was decided in 1947. Petitioner could not be required in 1941 to anticipate reversal in 1947 of such long established rule. Nor was the *Kaiser Case* in fact concerned with necessity for appearance before a board of equalization.

Petitioner specifically raised its additional injury under the Due Process clause on petition for rehearing [R. 160-166]. The California Supreme Court denied such petition [R. 177] without opinion or modification of its former judgment. Petitioner's additional Federal question was timely since raised at its first opportunity. *Missouri ex rel. Missouri v. Gehner,* 281 U. S. 313, 319-320; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 678.

CONCLUSION.

Wherefore, it is submitted that the Writ of Certiorari prayed for in the petition herein should be granted, and the judgment and order of the California Supreme Court should be reversed.

Respectfully submitted,

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